NEW FLP SDN. BHD.

v.

CLEMENT HII CHII KOK

HIGH COURT SABAH & SARAWAK, KUCHING
HAIDAR MOHD. NOOR J
[SUIT NO. KG. 64 OF 1987]
25 MARCH 1989

CIVIL PROCEDURE: *Order 13 r. 8 of the Rules of the High Court 1980 - To set aside judgment in default of defence - Unfettered discretion of the Court - Affidavit of merits to be affirmed by a responsible person - Proposed defence and counterclaim annexed - Whether part of affidavit.*

Plaintiff served a writ of summons on the defendant claiming a sum of RM 25,962.70 due and owing to the plaintiff. Defendant entered a memorandum of appearance but took no further action thereafter. Eventually, the plaintiff entered judgment in default of defence against the defendant. However, the defendant applied pursuant to O. 13 r. 8 of the Rules of the High Court 1980 and successfully set the judgment aside and was given leave to file a defence and counterclaim within 14 days of the order.

The plaintiff being dissatisfied, applied to have the matter adjourned into Court for further argument. The Court allowed it and the matter was argued in open Court.

Held:

[1] It is established principle that application made pursuant to O. 13 r. 8 or O. 19 r. 9 of the Rules of the High Court, the Court has a completely unfettered discretion to set aside a judgment by default and that such an unfettered discretion must be exercised judicially by the Court.

[2] If a judgment is regular then there must be an affidavit of merits i.e., an affidavit stating facts showing a defence on the merits, to be affirmed by a responsible person e.g., the plaintiff's solicitor or his clerk. It is also decided that the proposed defence and counterclaim exhibited to the affidavit is part of the affidavit and thereby the Court should be entitled to examine the proposed defence and counterclaim to see whether it has raised a triable case.

[3] It is established that the pleadings should be clear and concise and in this case the defendant has given sufficient particulars in the defence and more so in the counterclaim and the further details are matters of evidence to be adduced in the trial. Therefore, the defendant has shown that there are triable issues arising out of the statement of claim.

[4] The Court accepted that the defendant has given an honest and reasonable explanation as to why he took no steps to file the defence in his case earlier.

[Order given in chambers affirmed. Costs to the plaintiff to be taxed.]

Cases referred to:

Leong Han v. Kuppusamy [1959] 25 MLJ 96
Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Ra'ayat [1979] 1 MLJ 24
Evans v. Bartlam [1937] AC 473
Hallet v. Andrews 43 Sol Jo 68
Foo Chiew Fong v. Guriman [1957] 23 MLJ 52
Pakirisamy v. Janagi [1970] 2 MLJ

Legislation referred to:
Rules of the High Court 1980, O. 13 r. 8, O. 19 rr. 2(1), 9, O. 35 r. 2, O. 56 r. 2(2)

For the plaintiff - Kilat ak. Beriak; M/s. Chew, Jugah, Wan Ullok, Goh & Co. Advocates
For the defendant - Richard Poh; M/s. Poh & Co. Advocates

JUDGMENT

Haidar Mohd. Noor J:

By their writ of summons filed on 3 February 1987 the plaintiffs claimed from the defendant by virtue of a letter of appointment dated 1 September 1986 as a general manager of the plaintiffs' company for stocks of goods amounting to RM 28,567.70 received by him plus a sum of RM 4,395 being the balance of monies advanced to him by the plaintiffs for purposes of renovating his office in Kuching but subject to a deduction of RM 7,000 due to the defendant from the plaintiffs for the period from 15 September 1986 to 15 October 1986 thereby leaving a balance sum of RM 25,962.70 due and owing to the plaintiffs by the defendant and interests and costs.

The defendant's advocate *vide* letter dated 25 February 1987 annexed to encl. 3 addressed to the plaintiffs' advocate intimated therein that he is authorised to accept service on behalf of his client, the defendant, with the reservation of the right to counterclaim against the plaintiffs. The Court was duly informed of this arrangement and the Court's process server served the writ of summons on the defendant's advocate, M/s. Poh & Co. on 10 March 1987. On 17 March 1987 the defendant's advocate filed a memorandum of appearance for the defendant. Thereafter no further action was taken by the defendant's advocate wherein the plaintiffs' advocate through a letter dated 31 March 1987 (encl. 8) addressed to the defendant's advocate, pursuant to Registrar Circular No. 4(3) of 1986 gave 4 days' notice for the statement of defence to be served on his firm failing which he will proceed to take action under O. 19 r. 2 of the Rules of High Court 1980 ("RHC") to enter final judgment against the defendant. As there seem to be no response to the notice issued *vide* the plaintiffs' advocate's letter dated 31 March 1987, the plaintiffs' advocate proceeded to enter judgment against the defendant in the sum of RM 25,962.70 plus interest at 8% p.a. and RM 225 costs on 8 April 1987. Hence this application by way on summons in chambers dated 5 September 1987 (encl. 14) filed by the defendant purportedly under O. 13 r. 8 to set aside the judgment entered against the defendant in default of defence and counterclaim within 14 days of the order.

The application of the defendant was heard by me in chambers on 20 January 1989 wherein I allowed his application and accordingly granted him leave to file his defence and counterclaim within 14 days from the said date. The plaintiffs, through their advocate, filed an application (encl. 22) to the Court for an adjournment of the matter into Court for further argument pursuant to O. 56 r. 2(2) of the Rules of the High Court 1980. I allowed the application and the matter was argued in Court on 24 February 1989 and judgment was reserved.

I now proceed to give my judgment.

It is admitted by both advocates that the default judgment obtained by the plaintiffs is a regular judgment. The judgment was obtained pursuant to O. 19 r. 2(1) of the Rules High Court, that is, failure on the part of the defendant to deliver a defence as prescribed by Rules of the High Court.

It is, I think, an unquestionably established principle that when an application is made either under O. 13 r. 8 of the Rules High Court (pertaining to default of appearance) or under O. 19 r. 9 of the Rules of the High Court (pertaining to failure to serve a defence on the plaintiff) the Court has a completely unfettered discretion to set aside a judgment by default. No time limits of any kind are prescribed (see *Leong Han v. Kuppusamy* [1959] 25 MLJ. However it is equally an established principle that such an unfettered discretion must be exercised judicially by the Court. It is axiomatic that if a judgment is regular, which is the case here, then there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merits (see *Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Ra'ayat* [1979] 1 MLJ/ 24). The case of *Evans v. Bartlam* [1937] AC 473 which had been quoted and followed in a number of decisions by the Courts in this country, in my view, is the *locus classicus* on the issues of merits that will have to be shown by the defendant. The principles were clearly laid down by Lord Atkin in the said case at p. 480:

> The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a *prima facie* defence. It was suggested in argument that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake accident fraud or the like. I do not think that any such rule exists, though obviously the reasons, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion. If there were rigid rule that no one could have a default judgment set aside who know at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure. (emphasis added)

Let me now examine whether the defendant has filed an affidavit of merits in this case. The affidavit was affirmed by the advocate for the defendant/applicant. An affidavit should be made by a responsible person e.g., the plaintiff's solicitors or his clerk. *Hallet v. Andrews*, 42 Sol. Jo. 68 (see p. 90 or *Mallal's Supreme Court Practice*, 2nd Edn.) and therefore the affidavit filed by advocate for the defendant would appear to be in order. In his affidavit the advocate annexed thereto the proposed defence and counterclaim and such a document ("RP1") exhibited to an affidavit is part of the affidavit (see p. 485 at 41/11/2 of *Mallal's Supreme Court Practice*, 2nd Edn.). As Exhibit "RP1" is part of the affidavit, in my view, apart from what was deposed to therein in the affidavit, the Court should be entitled to examine the proposed defence and counterclaim to see whether it has raised a triable or arguable case. In the case of *Vann & Anor. v. Awford & Anor.* [1986] The Times LR 23 April 1986 the Court of Appeal held that defendant who deliberately misled the Court lying about the reason for not defending an action, was nevertheless entitled to have the judgment and award of damages made against him in default of his appearance set aside because he was able to show that there were triable issues arising out of the plaintiff's claim. Lord Justice Dillon said:

> It was the practice where an application was made to set aside a default judgment for the defendant to give the Court an explanation of his reasons for not defending the action and ignoring the proceedings.
>
> The defendant had chosen to give the Judge a false explanation: he had said on oath that he had not had knowledge of the proceedings as he had been in South Africa on business at the material time.

That he now accepted was a lie: he had known of the proceedings from an early stage. There was no satisfactory evidence of a good reason for his failure to defend.

The House of Lords in *Evans v. Bartlam* [1937] AC 473) examined and laid down principles on which the Court's discretion to set aside a default judgment under O. 35 r. 2 was to be exercised.

It was clear that the plaintiff's claim in the case looked at with the defendant's affidavit showed that there were triable issues. On the other hand there had been prejudice to the plaintiffs - the delay had kept them out of pocket for paying for the necessary remedial work on their property.

Judge Fox-Andrews had cited *Revidi v. Prentice Hall* ([1969] 1 WLR 157) as establishing that a defendant's failure to apply to set aside within seven days had to be reasonably explained by him and that as the defendant's explanation was not reasonable no extension would be granted.

That was a misdirection. Such a rigid rule would be inconsistent with *Evans v. Bartlam.*

The major consideration was whether there was a defence on the merits that transcended any reason given by a defendant for his delay.

On a close scrutiny of the proposed defence and counterclaim as tested against the statement of claim, I cannot find any defects in it and I am unable to accept the contention of advocate for the plaintiffs/respondents that the proposed defence and counterclaim contained mere bare allegations. It is an established principle that the pleadings should be clear and concise and in this case the defendant has given sufficient particulars in the defence and more so in the counterclaim and the further details are matters of evidence to be adduced in the trial. Clearly, therefore, the defendant has shown that there are triable issues arising out of the statement of claim.

On the other hand grounds raised by the advocate for the plaintiffs/respondents, that is, the defendant has to give a reasonable explanation as to delay in filling the defence and the filing of this application, these are secondary considerations and in any event, it is to be noted that the plaintiffs/respondents have not filed any affidavit to challenge the grounds put forth in the affidavit of the advocate for defendant/applicant as being untrue or unreasonable. Be that as it may, there is no evidence to show that the defendant in insincere in his application and advocate has, in my view given a honest and reasonable explanation as to why he took no steps. Mathew CJ in *Foo Chiew Fong v. Guriman* [1957] 23 MLJ 52 said:

Courts prefer that cases should be decided on their merits, and do not invoke procedural rules to prevent a defendant from defending an action unless the defendant has no merits in his application for a postponement.

Sharma J in *Pakirisamy v. Janagi* [1970] 2 MLJ in following the observations of the Court of Appeal in the case of *Foo Chiew Fong v. Guriman, supra,* said at p. 203:

In exercising their discretion it is the duty of the Courts to exercise that discretion judicially, that is in accordance with commonsense and in doing so should bear in mind all that may promote justice and not defeat it. If discretion is exercised otherwise, it may only tend to strike at the root of justice or result in injustice being done. I am furthermore of the view that every opportunity should be given to the litigants to put forward their cases and that they have a right to be heard within the limits prescribed by law if they do not violate any of the principles of procedure that the law has laid down. They have a right to be heard and it is

the function of the Courts to see that no unnecessary shackles are put on them by such rules of procedure which empower the Courts to exercise the discretion one way or the other especially if one of the parties concerned can be adequately compensated by costs.

For the reasons aforesaid, I will affirm the earlier order I made in chambers allowing the application of the defendant/applicant but the plaintiff's/respondents will, however, have the costs of his application and to be taxed accordingly.

Also found at [1989] 2 CLJ 678